

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

DENNIS M. BUCKOVETZ,
Plaintiff,
v.
U.S. DEPARTMENT OF THE NAVY,
Defendant.

Case No.: 3:15-cv-00838-BEN-MDD

**ORDER HOLDING RENEWED
MOTION FOR SUMMARY
JUDGMENT IN ABEYANCE UNTIL
RECORD SUPPLEMENTED**

Before this Court is Defendant's Renewed Motion for Summary Judgment. (Mot., ECF No. 16.) Plaintiff opposed (Opp'n, ECF No. 18), and Defendant filed a reply (Reply, ECF No. 19). Plaintiff then filed a motion for leave to file a surreply.¹ (ECF No. 20). For the reasons discussed below, the Court holds Defendant's motion in abeyance

¹ The Local Rules in the Southern District of California do not authorize the filing of a surreply. Still, district courts have discretion to either permit or preclude the filing of a surreply. *See United States v. Venture One Mortg. Corp.*, No. 13-cv-1872, 2015 WL 12532139, at *2 (S.D. Cal. Feb. 26, 2015). Considering that Plaintiff is proceeding pro se, the Court **GRANTS** Plaintiff's motion for leave to file a surreply. However, Plaintiff is advised to follow the Local Rules of this District. Future surreplies may not be granted.

1 until it supplements the record regarding the adequacy of its search for responsive
2 documents.

3 **BACKGROUND**

4 On September 12, 2014, Plaintiff submitted a Freedom of Information Act
5 (“FOIA”) request, seeking all documents relating to and associated with a sexual
6 harassment complaint. Plaintiff requested the complaint itself, email correspondence,
7 and related records resulting from the complaint. Plaintiff is not the complainant or the
8 subject of the complaint. Defendant denied Plaintiff’s request in full pursuant to an
9 attorney-client privilege exemption, citing 5 U.S.C. § 552(b)(5). Plaintiff appealed the
10 denial on January 7, 2015. Even after following up in March 2015, Plaintiff’s appeal
11 went unanswered. Plaintiff then initiated this action on April 16, 2015, challenging the
12 denial of his FOIA request.

13 After Plaintiff filed the instant lawsuit, Defendant subsequently released eighteen
14 (18) pages of responsive documents subject to redactions under Exemption 6. On March
15 1, 2016, Defendant filed a motion for summary judgment. This Court denied
16 Defendant’s motion, holding that the record was insufficient to find that Defendant
17 conducted an adequate search for the requested documents and that the responsive
18 documents are subject to any exemptions. (MSJ Order at 6, ECF No. 15.) Defendant
19 then renewed its motion for summary judgment, which is before the Court now. It argues
20 that the Department properly withheld documents and portions thereof pursuant to
21 Exemptions 6 and 7(C). In support of its motion, Defendant filed the Declaration of
22 Cinthia Christopher, the FOIA Coordinator for the Marine Corps Recruit Depot
23 (“MCRD”), and a *Vaughn* index.

24 **LEGAL STANDARD**

25 Summary judgment is appropriate when “there is no genuine dispute as to any
26 material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P.
27 56(a); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). In
28 considering a summary judgment motion, the evidence of the nonmovant is to be

1 believed, and all justifiable inferences are to be drawn in his or her favor. *Anderson*, 477
2 U.S. at 255.

3 A moving party bears the initial burden of showing there are no genuine issues of
4 material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). It can do so by
5 negating an essential element of the non-moving party's case, or by showing that the non-
6 moving party failed to make a showing sufficient to establish an element essential to that
7 party's case, and on which the party will bear the burden of proof at trial. *Id.* The burden
8 then shifts to the non-moving party to show that there is a genuine issue for trial. *Id.*

9 In an action brought under the FOIA, the withholding agency bears the burden of
10 proving it may withhold documents under one of the exemptions. 5 U.S.C. §
11 552(a)(4)(B); *U.S. Dep't of State v. Ray*, 502 U.S. 164, 173 (1991). It may meet this
12 burden by submitting affidavits showing that the information falls within the claimed
13 exemption. *Minier v. CIA*, 88 F.3d 796, 800 (9th Cir. 1996). "In evaluating a claim for
14 exemption, a district court must accord 'substantial weight' to [agency] affidavits,
15 provided the justifications for nondisclosure 'are not controverted by contrary evidence in
16 the record or by evidence of [agency] bad faith.'" *Id.* (citation omitted).

17 DISCUSSION

18 The FOIA provides for public access to official information that might be
19 "shielded unnecessarily" from public view. *Dep't of Air Force v. Rose*, 425 U.S. 352,
20 361 (1976). By enumerating nine exemptions, the FOIA also recognizes that some
21 information may legitimately be kept from the public and allows the government to
22 withhold certain documents and portions thereof. *See* 5 U.S.C. § 552(b)(1)-(9).

23 Defendant contends that it properly withheld and redacted documents. Plaintiff
24 argues that Defendant performed an inadequate search for the requested documents. In
25 addition, Plaintiff contends that the declaration and *Vaughn* index do not provide
26 sufficient detail to support the Defendant's nondisclosure.

27 I. Adequate Search

28 To show compliance with the FOIA, an agency must demonstrate that it

1 “conducted a search reasonably calculated to uncover all relevant documents.” *Zemansky*
 2 *v. EPA*, 767 F.2d 569, 571 (9th Cir. 1985) (citation and internal quotation marks omitted).
 3 “[T]he issue to be resolved is not whether there might exist any other documents possibly
 4 responsive to the request, but whether the *search* for those documents was *adequate*.” *Id.*
 5 (emphasis in original). In demonstrating the adequacy of the search, the agency may rely
 6 on “reasonably detailed, nonconclusory affidavits submitted in good faith,” *Zemansky*,
 7 767 F.2d at 571, describing “what records were searched, by whom, and through what
 8 process,” *Our Children’s Earth Found. v. Nat’l Marine Fisheries Serv.*, 85 F. Supp. 3d
 9 1074, 1082 (N.D. Cal. 2015) (internal citation omitted). The purpose of this requirement
 10 is to “afford a FOIA requester an opportunity to challenge the adequacy of the search and
 11 to allow the district court to determine if the search was adequate in order to grant
 12 summary judgment.” *Id.* (citing *Oglesby v. U.S. Dep’t of Army*, 920 F.2d 57, 68 (D.C.
 13 Cir. 1990)).

14 Upon receiving the FOIA request, Ms. Christopher contacted the Non-
 15 Appropriated Fund (“NAF”) employees’ Human Resources Office (“HRO”) at the
 16 MCRD. (Christopher Decl. ¶¶ 7, 8.) The complainant was a NAF employee and,
 17 therefore, her personnel record and any records about civilian complaints would be kept
 18 at the NAF HRO. (*Id.* ¶ 7.) Ms. Christopher spoke to Tina Broadaway, the NAF HRO
 19 Director. (*Id.*) Ms. Broadaway explained that while normally a NAF employee would
 20 file a complaint with the NAF HRO, in this case, the complainant spoke to Joetonya
 21 Ignacio in the Civil Service (“CS”) employees’ HRO at the MCRD. (*Id.* ¶ 8.) Ms.
 22 Ignacio was the CS HRO Equal Employment Opportunity (“EEO”) Representative. (*Id.*)
 23 Because of the circumstances of the complaint, the complaint was kept at the CS HRO,
 24 and an EEO file was opened there. (*Id.*) Ms. Broadaway told Ms. Christopher that the
 25 NAF HRO did not have any records responsive to Plaintiff’s request. (*Id.*)

26 Ms. Christopher spoke to Ms. Ignacio, who was unsure about what records could
 27 be released and referred Ms. Christopher to Jennifer Gazzo, Counsel for Labor &
 28 Employment Law with the Western Area Counsel Office at Camp Pendleton. (*Id.* ¶ 10.)

1 Ms. Gazzo reviewed her files and concluded that any responsive records were protected
2 by the attorney-client privilege and attorney work product doctrine. (*Id.* ¶ 13.) Ms.
3 Gazzo also indicated that the HRO at Camp Pendleton might have responsive records.
4 (*Id.*) Ms. Christopher then denied Plaintiff’s request, which included a partial referral to
5 the Camp Pendleton FOIA coordinator. (*Id.* ¶ 16.)

6 The Camp Pendleton FOIA coordinator forwarded Plaintiff’s request to the Camp
7 Pendleton HRO. (*Id.* ¶ 17.) The HRO replied that “[t]he information requested by Mr.
8 Buckovetz does not exist.” (*Id.*) The Camp Pendleton FOIA coordinator subsequently
9 mailed Plaintiff a negative responsive. (*Id.*)

10 After Plaintiff filed his complaint in this Court, the MCRD CS HRO was again
11 queried for responsive records. (*Id.* ¶ 20.) “The complete entire EEO record about the
12 incident, including emails, was physically retrieved from the CS HRO office on February
13 18, 2016, and photocopied. A review of these documents was conducted to determine
14 whether any of the documents were responsive to the Plaintiff’s request.” (*Id.*) Ms.
15 Christopher identified 18 pages of responsive documents and released them subject to
16 redactions. (*Id.* ¶¶ 20, 21.)

17 Here, while it appears that Ms. Christopher searched the three offices most likely
18 to have records—the MCRD NAF HRO, the MCRD CS HRO, and the Camp Pendleton
19 HRO—her declaration fails to explain adequately how those searches were conducted.
20 Rather, her declaration asserts in a conclusory manner that the NAF HRO and the Camp
21 Pendleton HRO did not have responsive records. It is unclear whether Ms. Broadway
22 actually searched NAF HRO records, or whether she told Ms. Christopher that her office
23 did not have responsive records based on the fact that “a decision was made to keep the
24 complaint at the CS HRO.” (*Id.* ¶ 8.) If Ms. Broadway conducted a search, the
25 declaration provides no information about what records were searched and what
26 processes were utilized. Similarly, although it is clear that the Camp Pendleton HRO
27 searched its records (*see* Ex. 4, Camp Pendleton FOIA Resp. Ltr. to Plaintiff (“A
28 thorough search of the requested records was conducted”)), Ms. Christopher’s declaration

1 does not describe “what records were searched, by whom, and through what process.”
 2 *Our Children’s Earth Found.*, 85 F. Supp. 3d at 1082. Finally, with respect to the search
 3 in the CS HRO, Ms. Christopher declares that the office was “queried for responsive
 4 records,” and then the “complete entire EEO record” was found, reviewed, and redacted.
 5 (*Id.* ¶ 20, 21.) But there is no explanation how the search was conducted and who was
 6 involved.

7 Therefore, on the basis of Ms. Christopher’s insufficient declaration, the Court
 8 cannot find whether the search method was reasonably calculated to uncover all relevant
 9 documents. The Court orders Defendant to submit a supplemental declaration regarding
 10 the adequacy of its search that cures the deficiencies noted above. Such a declaration
 11 must be filed within 21 days of the date of this Order. Plaintiff may file a response no
 12 later than 14 days after the record has been supplemented.

13 **II. Exemptions 6 and 7(C)**

14 Although the Court cannot rule on the adequacy of Defendant’s search, it will
 15 consider whether the 18 pages of responsive documents from the EEO file are subject to
 16 the protections of FOIA exemptions (b)(6) and (b)(7)(C). Defendant contends that all 18
 17 pages from the EEO file are subject to both exemptions. (Revised *Vaughn* Index, ECF
 18 No. 16-2.) This Court previously denied summary judgment because Defendant failed to
 19 provide a nonconclusory, detailed affidavit and an adequate *Vaughn* index. (MSJ Order
 20 at 6.) For the instant motion, Defendant has supplemented its declaration and *Vaughn*
 21 index regarding the withheld information.

22 Under the (b)(6) exemption, information contained in personnel, medical, and
 23 similar files is protected from disclosure where such disclosure would “constitute a
 24 clearly unwarranted invasion of personal privacy.” 5 U.S.C. § 552(b)(6). Pursuant to the
 25 (b)(7)(C) exemption, information compiled for law enforcement purposes is exempt from
 26 disclosure when the information “could reasonably be expected to constitute an
 27 unwarranted invasion of personal privacy.” § 552(b)(7)(C). Exemption 7(C) is similar
 28 to, but broader than, Exemption 6. Both Exemptions 6 and 7(C) require the court to

1 balance the individual's privacy interest against the public's interest in disclosure.
 2 *Council on Am.-Islamic Relations, Cal. v. FBI*, 749 F. Supp. 2d 1104, 1117, 1120 (S.D.
 3 Cal. 2010) (internal citations omitted).

4 Here, Plaintiff does not challenge the Defendant's classification of the documents
 5 as personnel and law enforcement records. Plaintiff also does not object to the
 6 withholding of pages 1 through 7. (Opp'n at 12.) Rather, Plaintiff argues that he is
 7 entitled to the names of individuals involved in the investigation on pages 8 through 18.
 8 (*Id.* at 9.) This Court disagrees.

9 As noted, the documents at issue relate to an investigation of a sexual harassment
 10 complaint. Defendant redacted the names of the complainant, accused co-workers,
 11 witnesses, and government employees involved in the investigation, as well as
 12 substantive information that could reveal the individuals' identities. (*See* Mot. at 7-8;
 13 Revised *Vaughn* Index; Christopher Decl. ¶¶ 30-35.) Defendant also redacted the
 14 complainant's factual allegations about the harassment, which include describing the
 15 conduct and identifying accused co-workers and witnesses. (*Id.*) These individuals have
 16 a legitimate interest in keeping this information from public view. *See Prudential*
 17 *Locations LLC v. U.S. Dep't of Hous. & Urban Dev.*, 739 F.3d 424, 431 (9th Cir. 2013)
 18 ("Individuals not only have an obvious privacy interest in being free from retaliation,
 19 harassment, embarrassment, or stigma. They also have a privacy interest in simply
 20 'keeping personal facts away from the public eye.'"); *Sinsheimer v. U.S. Dep't of*
 21 *Homeland Sec.*, 437 F. Supp. 2d 50, 56 (D.D.C. 2006) ("The disclosure of the names of
 22 witnesses, plaintiff's co-workers, investigators, and other personnel mentioned in the
 23 reports of investigations, who have thus been implicated—directly or indirectly—in these
 24 sexual harassment charges, would be extremely invasive of a well-recognized privacy
 25 interest.")

26 Moreover, Plaintiff has not shown that the public interest outweighs the privacy
 27 interests at stake. The only relevant public interest is the extent to which disclosure
 28 would shed light on the agency's performance. *See U.S. Dep't of Def. v. Fed. Labor*

1 *Relations Auth.*, 510 U.S. 487, 495-96 (1994). “That purpose, however, is not fostered by
 2 disclosure of information about private citizens that is accumulated in various
 3 governmental files but that reveals little or nothing about an agency’s own conduct.” *Id.*
 4 at 496 (internal citation omitted). Here, Plaintiff has failed to demonstrate that disclosure
 5 would advance the public knowledge of government operations. And, there is no
 6 evidence contradicting the agency’s justifications for nondisclosure or of agency bad
 7 faith. Rather, Plaintiff’s focus appears to be on his own personal interest in the
 8 documents. (See Opp’n at 6-7.) But, Plaintiff’s personal reasons for wanting the
 9 information are not legally cognizable factors in determining the propriety of withholding
 10 the documents. See, e.g., *U.S. Dep’t of Def.*, 510 U.S. at 496.

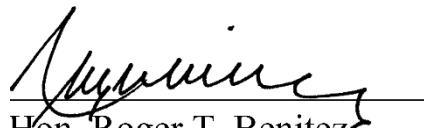
11 Therefore, the 18 pages of documents from the EEO file have been properly
 12 withheld or redacted pursuant to Exemptions 6 and 7(C). If Defendant can demonstrate
 13 the adequacy of its search, then this Court will grant its motion for summary judgment.
 14 However, until the Court is given sufficient information to make such a ruling, it holds
 15 Defendant’s motion in abeyance. See *Our Children’s Earth Found.*, 85 F. Supp. 3d at
 16 1088 (holding motions for summary judgment in abeyance pending supplementation of
 17 the record regarding government’s FOIA exemption claims).

18 CONCLUSION

19 For the reasons set forth above, the Court **HOLDS IN ABEYANCE** Defendant’s
 20 Renewed Motion for Summary Judgment until the record is supplemented regarding the
 21 adequacy of its search for responsive documents. Defendant must supplement the record
 22 within 21 days of the signature date of this Order.

23 **IT IS SO ORDERED.**

24
 25 Dated: November 4, 2016

26 
 27 Hon. Roger T. Benitez
 28 United States District Judge